

*ACT, Inc. v. Worldwide Interactive Network, Inc.*  
U.S. District Court for the Eastern District of Tennessee  
Case No. 3:18-cv-00186-TRM-HBG

**EXHIBIT E**

**PLAINTIFF AND COUNTER-DEFENDANT ACT, INC.'S  
OPPOSITION TO MOTION TO DE-DESIGNATE**

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TENNESSEE  
AT KNOXVILLE

\_\_\_\_\_  
ACT, INC.,

Plaintiff,

vs.

\_\_\_\_\_  
WORLDWIDE INTERACTIVE NETWORK,  
INC.,

Defendant.  
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) Case No.: 3:18-CV-186  
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**MOTION PROCEEDINGS  
BEFORE THE HONORABLE H. BRUCE GUYTON**

**July 8, 2019  
10:03 a.m. to 10:49 a.m.**

**APPEARANCES:**

**FOR THE PLAINTIFF:**

YASAMIN PARSAFAR, ESQUIRE  
Sheppard, Mullin, Richter & Hampton  
Four Embarcadero Center  
17th Floor  
San Francisco, California 94111

THOMAS S. SCOTT, JR., ESQUIRE  
Scott & Cain  
550 West Main Street  
Suite 601  
Knoxville, Tennessee 37902

**FOR THE DEFENDANT:**

W. KYLE CARPENTER, ESQUIRE  
J. CHADWICK HATMAKER, ESQUIRE  
Woolf, McClane, Bright,  
Allen & Carpenter  
900 South Gay Street  
Suite 900  
Knoxville, Tennessee 37902

(Proceedings recorded by mechanical stenography, transcript  
produced by computer-aided transcription.)

**REPORTED BY:**

Rebekah M. Lockwood, RMR, CRR  
Official Court Reporter  
(865) 210-6698  
P.O. Box 1823

APPEARANCES (CONTINUED) :

FOR THE DEFENDANT:

ROBERT E. PITTS, ESQUIRE  
JACOB G. HORTON, ESQUIRE  
RAYMOND E. STEPHENS, ESQUIRE  
Pitts & Lake PC  
1319 Old Weisgarber Road  
Knoxville, Tennessee 37909

Rebekah M. Lockwood, RMR, CRR  
Official Court Reporter  
(865) 210-6698  
P.O. Box 1823

1 (Call to Order of the Court)

2 THE COURTROOM DEPUTY: Case Number 3:18-CV-186, ACT,  
3 Inc. versus Worldwide Interactive Network.

4 Here on behalf of the plaintiff is Thomas S. Scott,  
5 Jr. and Yasamin Parsafar. Is counsel for the plaintiff present  
6 and ready to proceed?

7 MS. PARSAFAR: Yes.

8 THE COURTROOM DEPUTY: Here on behalf of the  
9 defendant is Jacob Horton, Raymond Stephens, Robert Pitts, W.  
10 Kyle Carpenter, J. Chadwick Hatmaker. Is counsel for the  
11 defendant present and ready to proceed?

12 MR. CARPENTER: We are.

13 THE COURT: All right. Good morning, Counsel.

14 This matter is basically a continuation of earlier  
15 proceedings where we addressed motion to compel filed by the  
16 plaintiff. The Court has reviewed, as much as possible, the  
17 documents that were filed up to and including through yesterday  
18 by the plaintiff.

19 The Court did review Document 113, of course, which  
20 was filed on July 3rd. I know generally categories of matters  
21 that are in issue.

22 So, Ms. Parsafar, will you be addressing the matter  
23 today?

24 MS. PARSAFAR: Yes.

25 THE COURT: Would you come to the podium, please?

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1 MS. PARSAFAR: Yes, Your Honor.

2 THE COURT: All right. If you would tell the Court,  
3 then, what documents and/or interrogatory answers you believe  
4 that you are entitled to that you have not received.

5 MS. PARSAFAR: Yes, Your Honor.

6 We still have not received a -- supplemental  
7 responses to our first set of interrogatories, which are still  
8 at issue in our -- in opposition to our first motion to compel  
9 responses to those interrogatories. WIN represented that it  
10 would supplement its responses if discovery continued.  
11 Discovery closes in three weeks on June 30th, and our summary  
12 judgment motions are due next month, and we still have not  
13 received supplemental responses that --

14 THE COURT: What are you planning on doing about the  
15 scheduling in this case? I mean, you just amended the  
16 complaint. Correct?

17 MS. PARSAFAR: Correct.

18 THE COURT: Do you think -- is this a case that you  
19 think is still on track to be tried on the current trial date?

20 MS. PARSAFAR: Yes. We do believe so, Your Honor.  
21 Our plaintiff's amendments don't require additional discovery,  
22 and we believe that WIN's -- Defendant WIN's amendments will be  
23 dismissed on a motion to dismiss.

24 The first set of interrogatories, as we discussed  
25 last time, requests that --

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1           THE COURT: With regard to some of these responses,  
2 it looks like there's a motion to allow -- for a document to be  
3 filed under seal. Any reason why the Court can't grant that  
4 motion today? I think it was just filed.

5           MS. PARSAFAR: We filed WIN's revenue summaries, I  
6 believe, under seal on the sole basis that WIN has designated  
7 those documents as highly confidential.

8           THE COURT: Any objection, Mr. Carpenter?

9           MR. CARPENTER: No, Your Honor.

10          THE COURT: All right. That motion will be granted.  
11 We'll enter the appropriate order.

12          All right. Sorry for the interruption. Go ahead.

13          MS. PARSAFAR: Thank you, Your Honor.

14          THE COURT: Okay. Can you be a little more specific,  
15 though, about these supplemental responses?

16          MS. PARSAFAR: Yeah. So the first issue is  
17 interrogatories 1 through 19, and that was the basis of our  
18 first motion to compel. WIN has not supplemented our  
19 responses. The interrogatories ask for the facts that support  
20 WIN's claims and defenses. And all we received is their legal  
21 position. They did not include facts, and they did represent  
22 that they would be supplementing as discovery continued to  
23 include facts, and they have a duty to do so. We still have  
24 not received those yet. And so that is -- that is the first  
25 issue, the first set of interrogatories.

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1           Would you like to do one issue at a time, or should I  
2 keep going?

3           THE COURT: Well, I guess my question is, if you have  
4 an outstanding request on every interrogatory 1 through 19 for  
5 a supplement?

6           MS. PARSAFAR: Yes, Your Honor.

7           THE COURT: All right. Okay. So your position is  
8 all the same?

9           MS. PARSAFAR: Yes.

10          THE COURT: Okay. What's next?

11          MS. PARSAFAR: The next issue is, the Court's May 17  
12 order states that defendant represents that it produced  
13 detailed summaries of its assessment revenues from its business  
14 dealings in multiple states and that it will also produce  
15 summaries of cost information once said summaries has been  
16 created. Once plaintiff has received these documents, if it is  
17 unsatisfied, it may contact the court to set a hearing.

18          That is the second issue. First, this order came out  
19 two months ago. We have not received the cost summaries.  
20 Second, the revenue summaries that they did produce were  
21 reviewed by our expert who determined that they were  
22 insufficient and inaccurate. And that is in the expert report,  
23 which I have brought along, if you would like to see a copy of  
24 it.

25          May I approach?

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1 THE COURT: Yes.

2 MS. PARSAFAR: If you turn to Page 4. At the top  
3 left, it says Page 4 of 14. It says Fulcrum, which is our  
4 expert witness on damages, has reason to believe that the  
5 documents available to --

6 THE COURT: Hold on, hold on. Let me catch up with  
7 you. Okay. I'm with you. Go ahead.

8 MS. PARSAFAR: So under Section A, Fulcrum has reason  
9 to believe that the documents available to Fulcrum and, hence,  
10 the amounts contained in the above heading and tables within  
11 the section are incomplete. Fulcrum identified multiple  
12 invoices that were not included in the WIN prepared summaries.  
13 See Exhibit 1 for a summary of such identified concerns based  
14 on WIN invoices. The uncertainty regarding the completeness of  
15 WIN's records and productions is made worse by WIN providing  
16 its accounting software QuickBooks file that would likely  
17 clarify the uncertainties but refusing to provide the password  
18 for this file that would allow its actual use. This failure to  
19 provide this relevant contemporaneous accounting file also  
20 affects WIN's cost analysis, which is discussed in  
21 Section 2(b).

22 Now, Your Honor ordered that WIN would not have to  
23 produce the QuickBooks file which would allow our expert to  
24 obtain the information that he needs because WIN represented  
25 that it has passwords and links to live bank accounts. Those

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1 issues would be covered under the protective order in this case  
2 if WIN were to designate it highly confidential. But if  
3 there's some reason not to trust the law firm, what WIN could  
4 do, which we propose, is provide versions of those QuickBooks  
5 files with the links and passwords redacted, so that our expert  
6 could have the information they need to fully analyze WIN's  
7 revenues and also costs. We still have not received the cost  
8 summaries, which our expert also noted in his report, at the  
9 top left, Page 3 of 14.

10 The bottom of the page says WIN should not be allowed  
11 to deduct any costs from the disgorged revenues because WIN  
12 failed to produce contemporaneous accounting records to  
13 substantiate its costs.

14 Again, Your Honor's order came out on May 17th for  
15 WIN to produce its costs summaries. It's been two months. We  
16 have not received them. And according to our expert who has  
17 reviewed many documents and invoices that we provided from WIN,  
18 their summaries are simply not accurate.

19 Can I continue?

20 THE COURT: Yes.

21 MS. PARSAFAR: The third issue, Your Honor, is that  
22 your May 17 order required WIN to supplement its responses to  
23 our second set of interrogatories and our second and third set  
24 of RFPs. And the order said that WIN should respond by  
25 identifying responsive documents by Bates number.

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1           Rather than fulfilling their obligation to review and  
2 find relevant material to produce to identify in response to  
3 our discovery requests, what WIN did is they responded by  
4 saying, here's a search string, attached are Bates numbers for  
5 all the documents that resulted from these -- from this search  
6 string, and we think these documents are most likely to have  
7 responsive information. That is insufficient, and it does not  
8 satisfy their burden in this case.

9           They're doing exactly what they did last time,  
10 whereas last time they dumped 700,000 documents on us and told  
11 us to go fish. This time they have identified a total of  
12 \$41,000, which may or may not be responsive and may not include  
13 all the responsive material.

14           They simply continue to fail to comply with their  
15 discovery obligations in this case. Their conduct is  
16 sanctionable. Courts have imposed sanctions where parties  
17 engaged in discovery misconduct, including, among other things,  
18 failing to review documents before producing them.

19           They didn't review the first time, and they didn't  
20 review and identify responsive material pursuant to the Court's  
21 order. They gave us a list of 40,000 documents, which may or  
22 may not be responsive.

23           If WIN -- our request is that WIN either be required  
24 to go through and identify responsive information pursuant to  
25 the Court's order, or if ACT is going to have to review these

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1 41,000 documents to determine what's responsive, WIN should  
2 have to pay for that review, and they should be precluded from  
3 offering any additional evidence not in those 40,000 documents  
4 at trial.

5 I'd like to give an example, if I may. In response  
6 to interrogatory number 20.

7 THE COURT: Is that from the second set of  
8 interrogatories?

9 MS. PARSAFAR: Yes, in the second set of  
10 interrogatories.

11 Interrogatory number 20 says, "State separately by  
12 year and entity the amount of money WIN has invoiced to each  
13 entity to which WIN has sold its assessment since 2012."

14 Then interrogatory number 20 requests to "State  
15 separately by each year and entity the amount of revenue WIN  
16 has collected from each entity to which WIN has sold its  
17 assessments since 2012."

18 In response, WIN identified search terms and a  
19 spreadsheet responding to both of these with 250 documents. I  
20 reviewed those 250 documents, and I would like to tell you what  
21 I found in them as an example of how their document dumps  
22 always include nonresponsive information and waste ACT's time  
23 and money having to go through, only to determine they're not  
24 responsive, and then to have to move to compel responsive  
25 information.

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1           The document -- the 250 documents included e-mails  
2 about invoicing for programs other than WIN's career readiness  
3 assessments, invoices for contract services and e-mails  
4 discussing them, invoicing issues with ACT, financial  
5 information from 1996 to 2011, which was before WIN even  
6 developed or began selling its assessments, e-mails regarding a  
7 2006 South Carolina workforce development program, which has  
8 nothing to do with the issues in this case and predate WIN's  
9 development of its competing assessments, invoices from 2000 to  
10 2000 -- 2013 to 2016 relating to various entities in South  
11 Carolina that predate the RFP response and sale of assessments  
12 at issue in this case, a 2010 audit of the Department of  
13 Management Services First District Court of Appeal courthouse  
14 construction project that has nothing to do with this case,  
15 invoices about on-site trainings that are pre 2017, which is  
16 the relevant time period that have nothing to do with this  
17 case, invoices to various entities for professional development  
18 services, e-mails about enrollment in a K-12 program that have  
19 nothing do in this case, a memorandum from the South Carolina  
20 Department of Revenue.

21           This is what happens every time. WIN avoids its  
22 discovery obligations by not reviewing and identifying  
23 responsive material, and ACT spends tens of thousands of  
24 dollars to review so far over a hundred thousand document to  
25 determine that the majority of them are not responsive and

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1 still cannot find the information that it needs for summary  
2 judgment and for trial.

3           So, again, with respect to that issue, we are  
4 requesting that WIN, if they're not going to go through and  
5 identify responsive information, that they pay ACT's cost to  
6 review the 40,000 document, 41,000-plus documents they  
7 identified, and that they're precluded from relying on any  
8 other information at trial.

9           The next issue is that Your Honor limited in your  
10 May 17 order the -- their responses to interrogatories to only  
11 the state of South Carolina. Since then -- and the reason was  
12 because that was the state that was mentioned in the complaint.  
13 Since then, as you know, ACT has moved to amend its complaint,  
14 which the Court granted on July 3rd in docket 110, and the new  
15 complaint lists other states, including West Virginia, Arizona  
16 and Kentucky, at docket 103-1, for example, in Paragraph 86,  
17 96, 104 through 106, and 101.

18           And so ACT respectfully requests that WIN's  
19 interrogatory responses not be limited to only the state of  
20 South Carolina, because there are other states at issue in this  
21 case.

22           And the last issue, Your Honor, is that in your  
23 May 17 order, you -- pursuant to our motion to dedesignate  
24 WIN's production, which, as you know, was entirely produced  
25 over 700,000 documents AEO. You asked WIN to provide

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1 spreadsheets identifying the AEO attorney.

2           During the -- while that motion was pending and in  
3 the briefing, WIN argued that two types of documents were AEO,  
4 its assessments and its financial information. That was what  
5 was discussed at the briefing and at the hearing, and that is  
6 what is addressed in the Court's order at Page 30 -- docket 89  
7 at Page 30 and docket 89 at Page 31.

8           What WIN gave to us is a spreadsheet of over 80,000  
9 documents, and we have not reviewed all 80,000 of the  
10 documents. But in the many documents that we have reviewed, it  
11 is clear that they have identified much more material than just  
12 their financial documents and their assessments as AEO.  
13 There's still 80,000 documents that remain AEO, and they have  
14 nothing to do with actual copies of the assessments or  
15 financial information.

16           So we would like an order dedesignating all of WIN's  
17 documents that are not assessments or financial information.  
18 We're going to be filing summary judgment motions and other  
19 documents, and we should not have to burden the Court with  
20 sealing orders, sealing motions every time for documents that  
21 are only requested sealing based on WIN's designation, which is  
22 not appropriate.

23           There's one other issue I would like to point out,  
24 Your Honor. This goes back to the first issue on their  
25 supplement to their first set of interrogatories. Their

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1 objections were based on two things. One, they said that the  
2 interrogatories asking for their facts were premature because  
3 it was early. That was in March. Discovery is closed at the  
4 end of this month. Another objection they have was that they  
5 were premature because many of them, according to WIN, were the  
6 subject of expert testimony. Expert reports have all been  
7 submitted. WIN did not submit rebuttal reports for two -- for  
8 three of ACT's experts, and the time for expert testimony and  
9 reports is passed. So those objections should all be  
10 overruled, and they should be required to give us the factual  
11 basis for their claims and defenses that we can be used to  
12 assess summary judgment.

13 Thank you.

14 THE COURT: Anything else?

15 MS. PARSAFAR: (Moving head sided to side.)

16 THE COURT: All right. Thank you, Counsel.

17 MS. PARSAFAR: Thank you.

18 THE COURT: Mr. Carpenter.

19 MR. CARPENTER: Your Honor, I must say this has been  
20 enlightening, because I will tell you that until we got here  
21 this morning, I did not know what ACT's complaint was. I  
22 didn't know if they're complaining that we'd identified too  
23 many documents or too few documents. It was just that whatever  
24 we had done was not appropriate.

25 They demanded that we meet and confer. We gave them

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1 a time. We said we can do it while I was on vacation. I  
2 contacted Mr. Pitts' office and Chad Hatmaker and said, "Hey,  
3 we need to do this. Set up a time."

4 And we wrote back and said, "Thursday, any time after  
5 two o'clock or between two and four, we can meet and confer."

6 Never heard back. Didn't hear a word. That was the  
7 same time that the Court -- they had demanded a telephone  
8 hearing with the Court, and the Court set out a schedule that  
9 said that the Court could handle it on -- at certain times.  
10 And while I was on vacation, I made arrangements for us to tell  
11 them when our times, we could do it, and we were going to  
12 convey that at the meet and confer, and they have never  
13 responded to the Court.

14 Now, these specific problems that have been  
15 identified, let's go through them one by one, because as I  
16 understand, the first one dealt with interrogatories with the  
17 original interrogatories 1 through 19.

18 And as I look back at the Court's May 17th order, and  
19 of course, I didn't even have a clue what they were complaining  
20 about till this morning, but as I look back at the Court's  
21 order, their motions to compel as to 1 through 19 was denied in  
22 your May 17th order. So I think that if there's going to be a  
23 complaint about 1 through 19, there's going to have to be a new  
24 motion.

25 I understand as we go forward, as we learn things, we

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1 have a duty to supplement. But their demand that they made  
2 back before your order of May 17th has been denied. So I don't  
3 know what basis they have to stand here and complain today.

4 The second complaint had to do with financial  
5 summaries. Here's what the Court had to say on Page 20 of its  
6 May 17th order. "Defendant also represents that it produced  
7 detailed summaries of its revenue -- of its assessment revenues  
8 from its business dealings in multiple states, and that it will  
9 also produce summaries of cost information once such summaries  
10 have -- has been created. Once plaintiff has received these  
11 documents, if it is unsatisfied, it may contact the Court to  
12 set a hearing."

13 Well, the Court did not order us to create anything.  
14 We said it was our intention to create cost -- summaries of  
15 cost information. It is still our intention, but we haven't  
16 done that yet. And so I don't think that we are required to  
17 create things and produce them. I do think that we've got an  
18 obligation once they're produced, and we're working on them  
19 now, to give them over. But the Court has not ordered us to do  
20 anything with the cost information, the financial summaries  
21 that we haven't done. So I don't know what the complaint is  
22 there.

23 The third thing dealt with the interrogatories 20  
24 through 25 and the request for production. On Page 21, the  
25 Court, talking about interrogatories 20 through 24 and 20

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1 through 25, says, first, as Ms. Parsafar has noted, the Court  
2 limited the response to South Carolina. And we did -- we took  
3 the option under Rule 33 to produce business records. And the  
4 Court said, in its responses to these interrogatories,  
5 defendant did not specify the records that must be reviewed.  
6 Defendants shall supplement its responses to interrogatories 20  
7 through 25 within 14 days in compliance with Rule 33D.

8 That is exactly what we did. We searched documents,  
9 and we answered interrogatories, and we said here is a  
10 spreadsheet where you can find the documents which are  
11 responsive. And in some instances, there might be several  
12 thousand documents. In one, as Ms. Parsafar has indicated,  
13 there are 250. In some, there might be a hundred documents.  
14 But we went through and we searched to identify the documents.

15 And then when we did -- when we responded, we said in  
16 order to -- for example, interrogatory number 20, in order to  
17 identify the business records previously produced to ACT that  
18 are most likely to contain information responsive to this  
19 interrogatory, the documents produced by WIN were searched  
20 using the following terms. This one says South Carolina and  
21 invoice and bill to, not technical report or curriculum.

22 That -- we said we have searched. This is how we  
23 searched. Nobody has ever come back and said, well, your  
24 search was too broad, or your search was too narrow, or could  
25 you add 2012 to this search. I mean, we have done a lot of

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1 work trying to comply with the Court's order and doing exactly  
2 what we thought the Court ordered us to do, go back through  
3 this large volume of documents and identify the documents where  
4 you think this information can be found. The's what we did.  
5 That's what I think the Court told us to do.

6 And nobody ever complained about -- nobody ever said  
7 your searches are wrong, why don't you tweak this search this  
8 way. Until we got here today, I had no idea whether any of  
9 these documents had ever been reviewed by ACT. I now know that  
10 250 have, their complaints about those. Nobody has ever picked  
11 up the phone and given me a call and said, you know, we got a  
12 problem with this, we need to work this out.

13 We get these e-mails demanding things, and then they  
14 don't meet and confer, and then they come in here and complain  
15 to the Court. They want the Court to reverse its order of  
16 May 17th and now include additional stakes. Well, the -- their  
17 motion to amend was only granted on July 3rd. The Court  
18 inquired whether this case could be tried as scheduled. I  
19 think clearly it cannot.

20 But we raised that in a telephone conference with  
21 Judge McDonough before he went to Europe. He put down an order  
22 allowing both sides amendments, and his order says that any  
23 changes to the schedule will take place after he has dealt with  
24 motions to dismiss. My interpretation of that is, that the  
25 parties are to file their motions to dismiss and deal with

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1 that, and then we will deal with the discovery on any new  
2 issues that survive the motions to dismiss.

3 Among those -- I mean, that -- they've -- their  
4 motion to amend adds a party. Obviously, there's going to be a  
5 whole lot of discovery that's going to be required, and I think  
6 that these additional states fall within that category.

7 But, clearly, we haven't done anything wrong since  
8 July the 3rd regarding discovery on these other states. And I  
9 think that we have done exactly what the Court expected us to  
10 do and exactly what we were required to do in terms of  
11 identifying attorneys' eyes only materials and dedesignate.

12 And I'll point out to the Court that, clearly, this  
13 is not a perfect situation on either side. On both sides,  
14 we've come across documents that have been designated  
15 attorneys' eyes only and needed to be changed. We've taken  
16 depositions in this case, and I think we're up to about 400  
17 exhibits in the depositions.

18 And from time to time, in a deposition, one side or  
19 the other will say, "I want to show this witness this document  
20 which you've designated attorneys' eyes only. Can you  
21 reconsider that?"

22 And we've said, "Yeah, you know, we'll remove that  
23 from this document, this particular document."

24 Now, when we've talked together, when we're  
25 face-to-face, these things don't take on this sort of

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1 magnitude.

2           This is not a situation where they need something to  
3 prepare for trial that they don't have. It is not a situation  
4 where we have failed in our discovery obligations. It's a  
5 situation simply where they want to complain, where they want  
6 to try to use discovery as a shovel to beat us over the head,  
7 rather than discovery for the purpose of trying to learn about  
8 the lawsuit.

9           We've complied with the Court's May 17th order. To  
10 the extent that we misinterpreted the order in any way, nobody  
11 has pointed it out to us, but we'll be glad to try to fix  
12 anything that we have misinterpreted. But as I read the  
13 Court's order, we've clearly done what the Court ordered us to  
14 do, and we shouldn't have to redo this thing.

15           Does the Court have anything further?

16           THE COURT: You mentioned financial summaries and  
17 cost information and that your client was working on them.

18           MR. CARPENTER: We are.

19           THE COURT: Is there a schedule for that?

20           MR. CARPENTER: Well, Your Honor, we ran into some  
21 problems with personnel and some people being out of the office  
22 that needed to be. We are working on it. And I think within  
23 the next few weeks, we can get it done.

24           THE COURT: Anything else?

25           MR. CARPENTER: No, Your Honor.

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1 THE COURT: Counsel, did you have anything else you  
2 wanted to say on the matter today?

3 MS. PARSAFAR: Yes, I do. Thank you very much.

4 First, I would like to address the representations  
5 that Mr. Carpenter made about ACT's meet-and-confer efforts.  
6 They are false. We reached out to WIN for weeks to discuss  
7 these issues. They first ignored us and then asked to defer  
8 until after mediation. And then when mediation failed, they  
9 continued to ignore us.

10 And because in light of the upcoming motion for  
11 summary judgment deadlines and the close of discovery, we could  
12 not wait any longer, and we requested a hearing pursuant to the  
13 Court's May 17 order.

14 Mr. Carpenter says this is the first time that he's  
15 hearing of these issues, but if you look at the e-mail that we  
16 sent to Ms. Nease back on June 5th, which was a month ago, it  
17 lists out the issues, and these issues have been represented to  
18 WIN before that, weeks before that, in e-mails.

19 If Your Honor would like, I am happy to file on the  
20 record or provide copies of our correspondence with WIN's  
21 counsel, so that you can see that we did ask to meet and confer  
22 many times before we put in our hearing requests, and that we  
23 did raise the issues with them of their spreadsheets being  
24 insufficient and not in compliance with the Court's order, and  
25 that they responded and said they were sufficient.

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1           Would you like us to file copies of that  
2 correspondence so that the Court can review it?

3           THE COURT: Just give me a minute, please.

4           MS. PARSAFAR: Sure.

5           THE COURT: I'm looking at your e-mail to Ms. Nease  
6 of June 5.

7           MS. PARSAFAR: And, Your Honor, before we sent this  
8 e-mail to Ms. Nease, we had e-mails to WIN asking them to meet  
9 and confer either on the phone or --

10          THE COURT: I said, will you give me a minute,  
11 please?

12          MS. PARSAFAR: Yes.

13          THE COURT: All right. Go ahead. What's your  
14 question?

15          MS. PARSAFAR: Would you like to see the  
16 correspondence between -- between ACT's counsel and WIN's  
17 counsel requesting meet-and-confer on these issues, because I'm  
18 happy to provide copies to the Court.

19          THE COURT: I'll leave that up to your discretion. I  
20 normally don't tell lawyers what to file and not file.

21          MS. PARSAFAR: Would we have permission to file them?

22          THE COURT: You have permission to if you want to.

23          MS. PARSAFAR: Thank you, Your Honor.

24          THE COURT: As does the other side, if they have  
25 anything they want to file on that point.

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1 MS. PARSAFAR: Thank you, Your Honor.

2 The next issue that Mr. Carpenter raises, he keeps  
3 saying that they're not required to create cost and revenue  
4 summaries. That's correct. They're not required to do it.

5 It's also not a substitute for discovery and their  
6 contemporaneous business records to have self-serving revenue  
7 summaries that they provided to us that our expert has already  
8 looked at the revenue summaries and determined that the  
9 information is not accurate. We have no reason to believe that  
10 their cost summaries are going to be any different or accurate.

11 That's why they're asking for their QuickBooks  
12 records, which is the most accurate way to get their revenue  
13 and summary and cost information, and they can simply redact  
14 password or account information.

15 If they -- if we wait for them to create cost  
16 summaries, we're going to need more time for our expert to  
17 review them to determine that they're also not accurate and  
18 there's simply no time for that. Expert reports have already  
19 been submitted, and there's no reason for them to create  
20 self-serving evidence, when all they need to do is download  
21 their QuickBooks file and produce it to us with their passwords  
22 redacted if the Court would like them to redact the information  
23 instead of having it protected under the protective order.

24 The next issue, Mr. Carpenter keeps saying, oh, we  
25 searched, here's the search, here's the search, the list of

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1 documents that resulted from our search. A search is not a  
2 substitute for their obligation to review documents and parse  
3 out irrelevant information before they identify them. That was  
4 stated by the Court in -- in ReedHycalog UK v. United Diamond  
5 Drilling Services, 2008 U.S. District Lexis 93177, at Page 8,  
6 Eastern District of Texas, October 3rd, 2008. The Court  
7 stated, "Part of a litigant's discovery obligation is to parse  
8 out irrelevant information."

9 Again, in another case, the Court says, "There's no  
10 basis for shifting the burden of document-by-document review to  
11 the Court or to opposing counsel," which is what they're doing  
12 here by just running a search and having us look through the  
13 documents. That's case U.S. Magnesium LLC v. ATI Titanium LLC,  
14 2:17-CV-00923. It's an order on August 3rd, 2018, at Page 6.

15 So they keep saying they complied with their  
16 obligations by running a search. Running a search is not  
17 sufficient. They need to review the documents and identify  
18 what's responsive instead of shifting that burden to us.

19 Again, Mr. Carpenter repeated that nobody complained  
20 about searches. It's in the e-mail to Ms. Nease, and this was  
21 after we had sent e-mails to WIN. So that is also false.

22 THE COURT: Anything else?

23 MS. PARSAFAR: That's all.

24 THE COURT: All right. Thank you, Counsel.

25 MS. PARSAFAR: Thank you.

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1 THE COURT: Mr. Carpenter, do you want to --

2 MS. PARSAFAR: Oh, I'm sorry, I forgot to say one  
3 more thing.

4 Mr. Carpenter said that the Court denied our motion  
5 to compel the first set of interrogatories, but that's not  
6 true. Page 17 of the order says it's not clear to the Court  
7 whether plaintiff's first set of interrogatories are still in  
8 dispute. If there's a dispute, to contact chambers.

9 That's what we did. There's a dispute. They said in  
10 their opposition to their first motion to compel, they would  
11 supplement as discovery continued. They haven't. Expert  
12 reports has passed. Discovery is about to close. They have  
13 not given us the factual basis for their claims and defenses as  
14 requested in the interrogatories.

15 Thank you.

16 THE COURT: Anything else?

17 MR. CARPENTER: Very briefly, Your Honor.

18 I will file for the record our e-mail where we  
19 offered to meet and confer on June 19th, and there was never a  
20 response. I didn't mean to say, if I did, that they had never  
21 said meet and confer. They've said meet and confer a hundred  
22 times. It's always they send an e-mail at 11:30 at night  
23 saying we need to meet and confer tomorrow morning. Tell us  
24 what your availability is. We did say we ought to put this off  
25 till after the mediation. And then we wrote and said let's

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1 have the meet-and-confer on Wednesday, June 19th, two o'clock  
2 in the afternoon, two to four, any time two to four. No  
3 response.

4 I -- the only thing I want to address is this idea  
5 that we are required to review these documents, because Rule 33  
6 gives us the option to produce business records. And it says,  
7 "If the answer to an interrogatory may be determined by  
8 examining, auditing, compiling, extracting, or summarizing the  
9 party's business records, including electronically stored  
10 information, and if the burden of deriving or ascertaining the  
11 answer will be substantially the same for either party, the  
12 responding party may answer by, one, specifying the records  
13 that must be reviewed in sufficient detail to enable the  
14 interrogating party to locate and identify them as readily as  
15 the responding party could."

16 That's the option which we've taken. And as I read  
17 the Court's order, the Court said, okay, you can do that, but  
18 you didn't specify. Go back and specify. So we ran the  
19 searches and we specified. And I think that's exactly what  
20 we're required to do under Rule 33.

21 THE COURT: Anything else?

22 MR. CARPENTER: No, Your Honor.

23 THE COURT: All right. Thank you.

24 MS. PARSAFAR: I'm sorry, Your Honor, can I respond  
25 to what he just said about Rule 33?

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1 THE COURT: Do you think he misread it?

2 MS. PARSAFAR: I think he's incorrect, because when  
3 he runs searches, that doesn't tell us that the documents  
4 listed, that we're going to be able to derive responsive  
5 information as readily as WIN can by reviewing their own  
6 documents and identifying what is responsive. When they dump  
7 that many documents on us, we have to review them, and then  
8 we -- we'll never know if they have identified all the  
9 responsive documents or not, because they haven't looked at  
10 them.

11 So it's not a substitute. And Courts have held,  
12 which is in our briefing, which I've stated here, that shifting  
13 the burden of review, regardless of Rule 33(d), from one party  
14 to another party is sanctionable.

15 It's not as readily identifiable to us to look at the  
16 documents and determine whether they're responsive and whether  
17 all the responsive information is there. It's their records.  
18 They know how their records are kept. They should review them,  
19 and they should identify what's responsive, not dump 41,000  
20 documents on us to figure out whether they are there or not,  
21 what we're looking for, and then have to come back to move to  
22 compel 40,000 documents later and hundreds of thousands of  
23 dollars, only to determine, like I read off to you the  
24 examples, that the responsive information is not there, and  
25 it's a bunch of unresponsive information. They should review

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1 the documents and identify them.

2 THE COURT: Okay. I think we're going around in  
3 circles now. Anything else?

4 MS. PARSAFAR: Thank you. No, that's all.

5 THE COURT: Are we finished?

6 MR. CARPENTER: I trust the Court can read Rule 33.

7 THE COURT: Was there anything else that either party  
8 wanted to bring before the Court today that I haven't  
9 addressed?

10 MR. CARPENTER: Your Honor, there's one thing that I  
11 want to bring up just -- and it's not ripe for decision, but to  
12 give the Court a heads-up.

13 On May 31st, Ms. Parsafar sent me an e-mail asking me  
14 for all dates that I was not available in July. That's what --  
15 on Monday June 3rd, I wrote her back and said I'm available  
16 anytime in July except July 3rd through the 5th and the week of  
17 the 15th.

18 So what they've done now is, they've set a deposition  
19 of the State of Arizona for July 19th.

20 And I immediately wrote her back and said, you know,  
21 I told you I wasn't available that week.

22 And her response is basically pound sand. We've  
23 worked around your schedule enough, and we're not going to do  
24 anything about this.

25 So if they insist on this deposition going forward on

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1 the 19th, then I'm probably going to have to file a motion to  
2 compel, and I'm just giving the Court's a heads-up on that.

3 MS. PARSAFAR: Your Honor, may I respond?

4 THE COURT: Yes.

5 MS. PARSAFAR: Your Honor, we only have till  
6 July 30th to take depositions. There were two weeks in June  
7 where we worked around WIN's counsel's vacation schedule and  
8 did not schedule depositions during that time to respect their  
9 vacation. As you can see here, there's five attorneys  
10 representing WIN. For them to block out another week in July  
11 because --

12 THE COURT: I understand. Okay. Let's see if  
13 there's an issue, and then I'll deal with it. I really don't  
14 want to give an advisory opinion on something that might get  
15 worked out.

16 But let me ask you this, and I know I asked you at  
17 the outset, I find it -- I've done a few lawsuits over the  
18 years, and I find it hard to believe that this discovery  
19 deadline is going to hold at the end of this month. In fact, I  
20 find it hard to believe your trial date is going to hold, if  
21 this case goes forward beyond the motion stage.

22 So I don't -- do you have any thoughts on that,  
23 Mr. Scott? You know about how lawsuits go and tempo. I'm not  
24 saying you don't, Counsel, at the podium, but I see Mr. Scott  
25 with his -- he's thinking, do I agree with that or not? I'm

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1 not going to force you to say anything, Mr. Scott, if you don't  
2 want to, but there's an awful lot on this case. We're talking  
3 about discovery ending in three weeks in this case?

4 MR. SCOTT: I think Ms. Parsafar can respond more  
5 accurately than could I.

6 THE COURT: All right, sir.

7 All right. Anything else?

8 MS. PARSAFAR: Again, I just want to say that ACT's  
9 amendments don't require additional discovery, although  
10 Mr. Carpenter just represented to you that when we added  
11 Defendant Teresa Chasteen, that would require additional  
12 discovery, that's inconsistent with what he -- we and he told  
13 the district report -- district court. Teresa Chasteen has  
14 already been deposed, and we're not going to need additional  
15 discovery there.

16 THE COURT: That's fine. Maybe I'm wrong. Maybe  
17 y'all are ready to go to trial right now. I don't know. I  
18 don't know. Maybe you'll be in three weeks. I just -- if you  
19 can, great. But I don't really want to give an advisory ruling  
20 on an issue that's just been raised today, hasn't been  
21 discussed by the parties.

22 MS. PARSAFAR: Thank you, Your Honor.

23 MR. CARPENTER: Your Honor, I just -- I mean, I  
24 cannot sit here and be accused now twice of saying something  
25 false. I didn't tell the Court that Ms. Chasteen -- adding

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1 Ms. Chasteen wouldn't require any additional time. They have  
2 contended that she is a new party. Obviously, it's going to  
3 require additional time.

4 THE COURT: Like I say, that issue is not before the  
5 Court.

6 MR. CARPENTER: I understand.

7 THE COURT: All right. So there's nothing else that  
8 actually is before the Court today that we haven't discussed.  
9 Right?

10 MR. CARPENTER: There's not.

11 THE COURT: All right. I'm sure you-all can work  
12 this out as reasonable as you-all are, gifted attorneys as you  
13 all are. In the meantime, we'll rule on these matters.

14 Madam Clerk, we'll be in recess until two o'clock.

15 THE COURTROOM DEPUTY: All rise. This honorable  
16 court stands in recess.

17 (Proceedings adjourned at 10:49 a.m.)  
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UNITED STATES DISTRICT COURT

## 1 CERTIFICATE OF REPORTER

2 STATE OF TENNESSEE

3 COUNTY OF KNOX

4 I, Rebekah M. Lockwood, RMR, CRR, do hereby certify  
5 that I was authorized to and did stenographically report the  
6 foregoing proceedings; and that the foregoing pages constitute  
7 a true and complete computer-aided transcription of my original  
8 stenographic notes to the best of my knowledge, skill, and  
9 ability.

10 I further certify that I am not a relative, employee,  
11 attorney, or counsel of any of the parties, nor am I a relative  
12 or employee of any of the parties' attorneys or counsel  
13 connected with the action, nor am I financially interested in  
14 the action.

15 IN WITNESS WHEREOF, I have hereunto set my hand at  
16 Knoxville, Knox County, Tennessee this 12th day of July, 2019.

17  
18  
19 

20 REBEKAH M. LOCKWOOD, RPR, CRR  
21 Official Court Reporter  
22 United States District Court  
23 Eastern District of Tennessee  
24  
25